No. 86 1703

Supreme Court, U.S.
FILED
APR 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

KENNETH LANCASTER,

Petitioner,

vs.

BUERKLE BUICK HONDA CO.

Respondent.

Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

PETITION FOR CERTIORARI

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QUESTION PRESENTED

I.

Whether the validity of waivers by Older Employees, of their rights under the Age Discrimination in Employment Act of 1967, are governed by the provisions of the Fair Labor Standards' Act, FLSA, 29 USC §216, the standards applied in Title VII cases, or by ordinary contract principles applied to agreements in general.

PARTIES TO THE PROCEEDING

Petitioner:

Kenneth Lancaster

Respondent:

Buerkle Buick Honda Co.

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No._____

IN THE

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Petitioner,

vs.

BUERKLE BUICK HONDA CO.

Respondent.

Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

Petition for Certiorari

Petitioner Kenneth Lancaster prays that a writ of **certiorari** be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this proceeding.

Opinions Below

The opinion of the Court of Appeals affirming the order of the District Court is reported in No. 86-5020-MN (8th Cir. Jan. 21, 1987) 42 F.E.P. Cases (BNA) 1472, 809 F.2d

539 (8th Cir. 1987). It appears in Appendix A to this petition. The opinion of the United States District Court for the District of Minnesota is Reported in Civ. No. 4-84-1060 (Dist. Minn. Nov. 27, 1985). It appears in Appendix B to this petition.

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on January 21, 1987. This petition is filed within ninety days thereof. The jurisdiction of this court is invoked pursuant to 28 U.S.C.§1254 (1).

Statutes Involved

The following sections of the Age Discrimination In Employment Act of 1967, 29 U.S.C.§§621-634 (hereinafter referred to as the "ADEA"), and in the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§201-262 (hereinafter referred to as "FLSA") are involved in this case:

ADEA, § 7(b) 29 U.S.C. § 626(b), which provides in part:

> The provisions of this Act shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217)...

FLSA § 16(c), 29 U.S.C. § 216(c):

> The secretary is authorized to supervise the payment of the unpaid minimum wages or the overtime compensation owing to an employee or employees under

§ 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a Waiver by such employee of any rights he may have under Subsection B of this Section for such unpaid minimum wages or unpaid overtime compensation and additional equal amount as liquidated damages.

A. Facts

Petitioner, Kenneth Lancaster, had been induced to leave a good position with General Motors by Buerkle when he was first hired. At the age of 53 he was terminated without any prior notice at the close of his working day on Friday, December 30, 1983, after 13 years as a service manager with Buerkle, and one year before his retirement benefit was fully vested. His position was subsequently filled by a new employee who was 28 years old. Immediately after Petitioner was informed of his termination, Respondent handed Petitioner an agreement (prepared by Respondent's lawyer) for Petitioner's signature that offered Petitioner 6 months severance pay and continued life insurance. The agreement contained a clause releasing Respondent from any and all claims Petitioner might have arising from the termination. Petitioner attempted to discuss the termination with Respondent and asked for time to review the agreement at that time or over the New Year's holiday weekend. Petitioner's repeated requests were denied.

After the holiday weekend, Respondent's general manager went to Petitioner's home and presented Petitioner with a letter offering one year of severance pay. The general manager told the Petitioner that he had no choice but to sign the agreement in order to obtain the severance

pay. Petitioner signed the letter at that time without any advice from legal counsel.[1]

B. Proceedings Below

Petitioner filed a complaint and demand for jury trial in the United States District Court of Minnesota, Third Division in October, 1984, alleging violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA), Employee Retirement Income Security Act, (ERISA), 29 U.S.C. § 2001 *et seq.*, and other claims including promissory estoppel. Respondent filed a Motion for Summary Judgment arguing that the release agreement barred Petitioner's suit. Petitioner argued that the release agreement was invalid and that it was obtained in violation of the ADEA's procedures, and was an unknowing and involuntary waiver. Petitioner further argued that there existed a genuine question of material fact as to whether the waiver was valid which precluded summary judgment.

The District Court granted Respondent's Motion for Summary Judgment finding the release valid under state contract law. Although the gravamen of Petitioner's complaint was a claim for relief under the ADEA, the District Court tersely dismissed the applicability of the ADEA.

On appeal, the Eighth Circuit affirmed rejecting the ADEA and setting the procedures for obtaining waivers and applying ordinary contract analyses to find the release agreement valid. The Eighth Circuit's decision acknowledges that the ADEA incorporates the enforce-

---

[1]Petitioner did not attempt to find an attorney on the day following the New Year's Eve holidays who could advise him, because he believed it would be unlikely that he could locate an attorney on such short notice at that time. Further, he was not allowed to have the document containing the waiver until he signed it.

ment provisions of the Fair Labor Standards Act, FLSA, 29 U.S.C. § 216, but dismisses the incorporation of FLSA case law which has prohibited waivers of rights through private releases. (Ap. Ct. Op. at Appendix 2a). The Eighth Circuit also rejected Petitioner's claims that the release agreement did not bar Petitioner's claims because the agreement failed to specify the releases of claims under the ADEA, or any discrimination laws. Furthermore, the Eighth Circuit determined that Plaintiff had knowingly and voluntarily released his rights, under ordinary contract principles. Consequently, the Eighth Circuit Court of Appeals upheld the validity of the release agreement waiving Petitioner's ADEA rights and barring his right to sue on all and any employment-related claims.

Reasons for Granting the Writ

I. The Standard for Determiningg the Validity of Waivers of Older Workers' Rights Under ADEA is an Important Question of Law Which This Court Has Not Resolved.

The legal issue here submitted for this court's consideration is what shall be the standard for determining the legality of a waiver of the statutory rights under the Age Discrimination in Employment Act of 1967, "ADEA", 29 U.S.C. § 621 *et seq.* The ADEA in § 626(b) incorporated § 16(c) of the Fair Labor Standards Act of 1938, "FLSA" which specifically sets forth the procedure by which a waiver would bar subsequent suit:

> "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the overtime compensation owing to an employee or employees under § 6 or 7 of this Act, and the agreement of any

> any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any rights he may have under Subsection B of this Section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages."

Under § 16(c) of the FLSA, a waiver of rights is valid if supervised by the agency charged with administration and enforcement of the Act. Thus, the statute itself provides a standard for determining the validity of a waiver of rights.

The Eighth Circuit's decision below considers various standards in determining whether the waiver of Petitioner's ADEA's rights was valid, but does not mention or apparently even consider § 16(c) of the FLSA. The court below briefly discusses then clearly rejects the standard applied by this court to general waivers of rights under the FLSA. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945). Finally, although the Eighth Circuit purports to rely on the voluntary and knowing standard utilized in Title VII cases, it appears to apply another standard based solely on ordinary contract principles. In so doing, the decision below creates confusion as to the proper standard and burden of proof applicable to ADEA waivers. Consequently, Supreme Court review is necessary to clarify the proper standard applied to waivers under the ADEA.

In enacting the ADEA, Congress selectively incorporated the enforcement provisions of the FLSA:

> "The provisions of this Act shall be enforced in accordance with the powers, remedies and procedures

> in §11(b), 16 (except for subsection (a) thereof) and 17 of the Fair Labor Standards Act of 1938, and subsection (c) of this section ... Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wage and overtime compensation for purposes of Section 16 & 17 of the FLSA: Provided that liquidated damages shall be payable only in cases of willful violations of the Act ..." 29 U.S.C. §626 (b).

In *Lorillard vs. Pons,* 434 U.S. 575 (1978) the Supreme Court interpreted §626(b) and the extent of ADEA incorporation of FLSA decision law on the issue of whether a plaintiff has a right to jury trial in ADEA actions stating on page 581:

> "...in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."

The Court made note of, "Congress' desire to use an existing statutory scheme ... and, on the other hand, it's dissatisfaction with some elements of each of the preexisting schemes." at 578.

Neither the FLSA nor the ADEA provide specifically for the right to a jury trial, Yet the Court concluded that ADEA litigants have the right based on court decisions interpreting the FLSA. Thus, the Court incorporated into the ADEA, judicial doctrine interpreting the FLSA:

> "Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held. Congress is presumed to be aware of an administrative or judicial

> interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute . . ."

at 580-81 (citations and footnot omitted).

In a similar vein, neither the FLSA nor the ADEA address the issue of whether an employee may waive his statutory rights. However, under FLSA case law an employee's right to minimum wages, overtime compensation and liquidated damages is non-waivable. In *Barrentine vs. Arkansas-Best Freight Systems,* 450 U.S. 728, at 740 (1981) the Supreme Court having before it the issue of whether an employee's FLSA rights may be waived through a colective bargaining agreement, clearly enuciates this rule:

> "This Court's decisions interpreting the FLSA have frequently emphasized the non-waivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. *Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived . . .* " (emphasis ours) at 740.

Even the dissenting opinion in Barrentine recognized the law on this subject at 746:

> "I agree, of course, that the Congressionally created right of individual workers to a minimum wage under §6 of the F.L.S.A., 29 U.S.C. §206, may not be waived through a collective bargaining agreement between an employer and the worker's union or through a direct agreement between an individual worker and the employer."

A typical post *Barrentine* lower court FLSA case is *Lynn's Food Stores, Inc. v. U.S.A.*, 679 F.2d 1350, at 1355 (11th Cir. 1982) where the Eleventh Circuit, citing *Barrentine,* held that a settlement agreement between employees and their employer under the FLSA was invalid, because it was not supervised by the Department of Labor or a court:

> "Other than a Section 216 (c) payment supervised by the Department of Labor, there is only one context in which compromises of FLSA back wage or liquidated damage claims may be allowed: a stipulated judgment entered by a court which has determined that a settlement proposed by an employer and employees, in a suit brought by the employees under the FLSA, is a fair and reasonable resolution of a bona fide dispute over FLSA provisions."

In the recent case of *Tony and Susan Alamo Foundation, et. al., vs. Secretary of Labor,* 471 U.S. 290 (1985) in which it was the employees who wished to assert the waiver by disclaiming coverage under FLSA the Supreme Court once again confirmed its earlier holdings that without supervision, employees may never waive the protection under the Act:

> "That the associates themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to *use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."* (emphasis ours)

Both *Barrentine* and *Alamo Foundation* based their holdings on *Brooklyn Savings Bank vs. O'Neil,* 324 U.S. 697 (1945). *Brooklyn Savings* was the first Supreme Court decision to establish that the right to *minimum wages and overtime compensation* was non-waivable in suits arising under the FLSA:

> "Neither petitioner nor respondent suggest that the right to the basic statutory *minimum wage* could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act." (emphasis ours) at 707.

As has already been noted, Section 626(b) of the ADEA states that, "Amounts owing to a person as a result of a violation of this Act shall be deemed to be *unpaid minimum wages or unpaid overtime compensation* for purposes of §16 & 17 of the FLSA." (emphasis ours). Thus an employee *may not waive* his statutory rights under the ADEA.

The facts in *Brooklyn Savings* involved an employer who had obtained a release from its employee in an amount less than the employee's full FLSA entitlement. The Supreme Court held that a private, unsupervised release was invalid under the FLSA when there was no bona fide dispute as to liability, stating at 704:

> "The issue presented in No. 445 therefore is whether in the absence of a bona fide dispute between the parties as to liability, respondent's written waiver of his right to liquidated damages under §16(b) bars a subsequent action to recover liquidated damages. We are of the opinion that it does not bar such a claim."

Even if it may be argued by respondent that the facts in Lancaster's case are in dispute, the rule of no waiver

would still apply because in *Schulti vs. Gangi,* 328 U.S. 108 (1946) the Supreme Court explicitly addressed the question left open in *Brooklyn Savings:*

> "...we granted certiorari in order to determine the issue which was not passed upon in *Brooklyn Savings vs. O'Neill...*"

Gangi held that a private, unsupervised release was invalid when there *was* a bona fide dispute as to liability. The liability dispute was whether employees were covered by the Act:

> "We think the purposes of the Act ... leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage." *Gangi* at 116.

Thus under both the *Brooklyn Savings* and *Gangi* line of cases dealing with the statutory rights of employees a waiver obtained by the Employer is not a bar to a private suit.

However, as has been previously discussed, the Supreme Court, in *Barrentine* and *Alamo Foundation* has more recently held that it does not consider *any* private, unsupervised release valid under the FLSA. These cases, along with the clear language in *Brooklyn Savings* concerning the absolute non-waivability of the right to *minimum wages* should leave no doubt that an unsupervised waiver of statutory rights under the ADEA is no bar to a private suit.

II. The Purported Waiver Fails To Meet Standards Required By This Court Under Title VII Cases Because It Contains No Express Waiver Of The Petitioner's Claim Under The ADEA.

Our Minnesota District Court in *Strand et al vs. Garden Valley Telephone Company,* 51 F. Supp. 898 (D.C. Minn.1943) has long recognized:

> "An employee under the Fair Labor Standards of 1938 may not bargain away such rights as are given by the Act. The right to damages for failure on the part of the employer to pay an employee the minimum wage is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between parties. To hold otherwise would be an abortion of the intent of Congress, defeat in part the purposes for which the Act was passed, and open the way to injustice, if not fraud..." at 904.

But even if such rights could be waived the Court went on the state:

> "...*I think* this Defendant *might* have been able to settle or compromise such honest dispute ... The facts with reference to such compromise to settlement must, however, be a clear-cut and definite. There must be a final meeting of the minds upon the compromise, with *full understanding of the dispute and the effect of the compromise.* at 905.

In reviewing the circumstance upon which the "release was taken from the Petitioner, he was not in a position to have, or even fairly offered the opportunity to have either a full understanding of his claims or realize the effect of his release.

Lack of specificity in the release is of itself, a ground for reversal separate and independent from the failure to obtain EEOC supervision theory. The instant release is a very general, broad release. It makes no mention of ADEA rights or even statutory rights in general. There was no discussion between the parties of ADEA rights or

the meaning of the waiver thereof before the release was executed.

Strand requires, for a valid release, that there be a "meeting of the minds," "with full understanding of the dispute and the effect of the compromise." The release in the instant case falls far short of these requirements.

The rule followed in Strand for a valid release of a Federal statutory right is in substance the same rule articulated by the Court in *Alexander vs. Gardner Denver Company,* 415 U.S. 36 (1974):

> "In this case, petitioner and respondent did not enter into a voluntary settlement *expressly* conditioned on a waiver of petitioner's cause of action under Title VII..."

at 52 n. 15 (emphasis ours).

Gardner-Denver requires that a waiver be *express.* The Sixth Circuit Court, in *Lyght vs. Ford Motor Company,* 643 F2d 435 (6th Cir. 1981) also required a "degree of specificity" in waiver forms, holding:

> "We agree with the 5th Circuit that waiver of a federal remedial right is not lightly to be inferred. It is clear in this case that petitioner (Lyght) and respondent (Ford) did not enter into a voluntary settlement *expressly conditioned* on a waiver of Petitioner's cause of action under Title VII."

at page 441.

In the instant case, *any* mention of ADEA rights is conspicuously absent from the release signed by Lancaster. Based upon the holdings in *Strand, Alexander vs. Gardner-Denver,* and *Lyght vs. Ford* this release should not be a bar to Lancaster's ADEA cause of action.

III. The Circumstances Under Which The Purported Waiver Was Taken From The Petitioner Raise A Fact Issue On Which The Petitioner Was Entitled To A Jury Trial.

The Release which the Respondent obtained was not from an arms length transaction between equally informed parties who have been allowed to become informed about any rights which are being released or extinguished, nor was it one in which the employee, an immigrant from England, a mechanic by training, was afforded a reasonable opportunity to consult counsel. But rather, the facts clearly indicate that the release was an ultimatum dictated by a party who was in a superior position, the employer, dealing with his employee, under circumstances where the employee was taken completely by suprise and denied the opportunity to have the documents in his possession overnight to review. Neither was the employee given a reasonable opportunity to consult independent counsel. He was shown the document only at the time he was asked to sign it. The document stated in part:

> "*You hereby release* the Company, it's officers and employees from each and *every claim of any kind* which you may have, or *hereinafter may have* resulting from your termination of employment by the company..." (emphasis ours)

Summary judgment against Lancaster's complaint or any of his claims is unwarranted. Summary judgment should only be rendered if there exists no genuine issue as to any material facts and Respondent is entitled to judgment as a matter of law. Rule 56(c), F.R.C.P. Such is not the case here. The pleadings, depositions, and all other papers on file in this case dispute Respondent's Conten-

tion that the waiver was willfully and knowingly given. In determining whether material factual disputes exist, facts and inferences should be veiwed most favorably to the non-moving party. *Aronsen v. Crown Zellerbach,* 662 F. 2d 584 (9th Cir. 1981).

In *Larson v. American Wheel and Brake, Inc.,* 610 F. 2d 506, (8th Cir. 1979) our appellant court has in the past stated the rule which is applicable to this case:

> "The purpose of a motion for summary judgment is to test the intrinsic merits of the case and to determine prior to trial whether, the parties have a real basis for relief or defense. Such motion is not a substitute for trial, and where the record, examined in the light most favorable to the nonmoving party, shows any material facts or factual inferences in dispute. *** summary judgment is inappropriate."

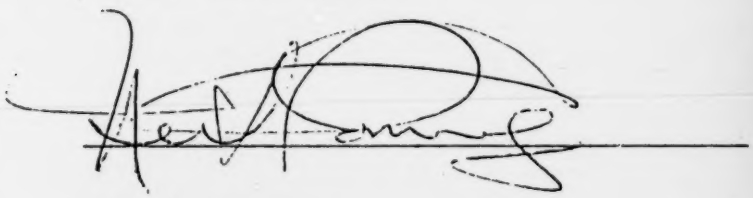
at 509.

Viewing the facts and inferences in a light most favorable to Lancaster, Summary Judgment should not have been granted by the trial court and the case should be allowed to go to trial before a jury to which the Petitioner is entitled as recognized by this Court in *Lorillard vs. Pons.*

Conclusion

Older employees in ever increasing numbers are being required to waive their statutory Federal Rights upon dismissal before reaching retirement. This Court is urged to settle the question of standards for their validity by granting Lancaster's petition for a Writ Of Certiorari.

Respectfully submitted,



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From the Eighth Circuit Court of Appeals

APPENDIX

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Appendices

A. Kenneth Lancaster v. Buerkle Buick Honda Co., No. 86-5020 (8th Cir. Jan. 21, 1987) 42 F.E.P. Cases (BNA) 1472, 809 F. 2d 539 (8th Cir. 1987). 1a

B. Kenneth Lancaster v. Buerkle Buick Honda Co. Civ. No. 4-84-1060 (Dist. Minn. Nov. 27, 1985) . 5a

Appendix "A"

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-5020

Kenneth Lancaster,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for
Buerkle Buick Honda Co.,	*	the District
	*	of Minnesota
Appellee.		

Submitted: December 10, 1986
Filed: January 21, 1987

Before ROSS and FAGG, Circuit Judges, and HANSON,* Senior District Judge

FAGG, Circuit Judge.

Kenneth Lancaster appeals the district court's entry of summary judgment in favor of Buerkle Buick Honda Co. (Buerkle Buick). We affirm.

Lancaster began work for Buerkle Buick in 1971 as a service manager. On December 30, 1983, at the age of fifty-three, Lancaster's employment was terminated by Buerkle Buick. Lancaster claims he was terminated because of his age. Buerkle Buick maintains the decision was a result of Lancaster's unsatisfactory work perfor-

*The HONORABLE WILLIAM C. HANSON, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

mance and the recommendation of an independent consulting firm in connection with reorganization of the service department.

After his termination Lancaster read and signed a termination agreement. The agreement obligated Buerkle Buick to pay Lancaster nearly $39,000 in severance pay and to pay six months medical insurance premiums for Lancaster. Buerkle Buick also agreed not to restrict Lancaster's right to work for a competitor and not to contest any claim by Lancaster for unemployment compensation. In exchange Lancaster agreed to cooperate in any related audit of Buerkle Buick and to preserve the confidentiality of information learned during his employment. Lancaster also agreed to release Buerkle Buick from "each and every claim of any kind *** resulting from [his] termination of employment."

Approximately nine months after he was terminated Lancaster filed this action in district court claiming the release was invalid and setting out various claimed violations by Buerkle Buick of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Program (ERISA), 29 U.S.C. §§ 1001-1461. Lancaster also made claims for misrepresentation. The district court granted Buerkle Buick's motion for summary judgment, finding the termination agreement contained a valid and enforceable release barring Lancaster's suit.

Lancaster initially argues he cannot release his ADEA claim. The ADEA incorporated by reference the enforcement provisions of the Fair Labor Standards Act. (FLSA). *See* 29 U.S.C. § 626(b). Both the FLSA and the ADEA are silent on whether statutory claims may be privately released. The FLSA, however, has been interpreted to prohibit waiver through private releases of certain FLSA statutory coverages and rights. *See, e.g. Tony & Susan*

Alamo Found. v. Secretary of Labor, 471 U.S. 290, 302 (1985); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 745 (1981); *D.A. Schulte, Inc. v. Gangi,* 328 U.S. 108, 114 (1946); *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707 (1945). By implication, Lancaster argues, an employee's statutory rights under the ADEA are similarly not waivable through an unsupervised private release. We disagree.

This court has recently held ADEA claims involving bona fide factual disputes over the intent and motive of an employer for a termination may be validly settled in the manner undertaken here by Lancaster and Buerkle Buick. *Moore v. McGraw Edison Co.,* 804 F.2d 1026, 1033 (8th Cir. 1986); *see also Runyan v. National Cash Register Corp.,* 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied,* 107S. Ct. 178 (1986); 50 Fed Reg. 40,870-71 (1985). *Moore* controls this case and permits the unsupervised release of Lancaster's ADEA claim.

Lancaster next argues his ADEA claim is not barred because the termination agreement fails to mention expressly any release of claims under the ADEA. *Moore* does not require the termination agreement specifically to mention the ADEA. *See Moore,* 804 F.2d at 1033; *see also Runyan,* 787 F.2d at 1044 n.10. We conclude Lancaster's broad release of all claims resulting from his termination also releases his ADEA claim.

Finally, Lancaster argues the termination agreement does not bar this suit because he did not knowingly and willingly release his employment-related claims. In determining whether the release was knowingly and voluntarily given, "we apply ordinary contract principles." *Runyan,* 787 F.2d at 1044 n.10. The undisputed facts do not support Lancaster's argument.

Lancaster was first presented with the termination agreement on December 30, 1983, but did not sign it until

January 4, 1984. In the interim he chose not to consult an attorney. Lancaster admits he read the agreement and considered its terms before signing. The agreement covers less than two typewritten pages, is written in clear and simple language, and unambiguously releases all of his claims relating to termination of his employment. The agreement contains no ultimatums or deadlines for its acceptance. Lancaster admittedly had input into the terms of the agreement and in fact negotiated significant favorable additions to it. Lancaster was a well-paid management employee who has experience in business and who has signed numerous contracts in his lifetime.

Even viewing these facts with the benefit of all reasonable inferences in the light most favorable to Lancaster, there is no genuine issue of material fact with regard to the basic facts underlying the making of the termination agreement. Lancaster made no showing Buerkle Buick was guilty of exploitation or over-reaching in these circumstances. Thus, we conclude the district court correctly determined the parties knowingly and voluntarily entered into the termination agreement and that Lancaster released all of his employment-related claims.

Accordingly, the district court's entry of summary judgment in favor of Buerkle Buick is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

Appendix "B"

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Kenneth Lancaster,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Memorandum Opinion
	)	and Order
Buerkle Buick Honda Co.,	)	
	)	Civil No. 4-84-1060
Defendant.		

NEIL P. CONVERY, Esq. Rivard, Convery & Associates, 1000 Northern Federal Building, St. Paul, MN 55102, appeared on behalf of plaintiff.

GREGORY J. STENMOE, Esq., Briggs & Morgan, 2400 IDS Center, Minneapolis, MN 55402, appeared on behalf of defendant.

Plaintiff Kenneth Lancaster brought this action against defendant Buerkle Buick Honda Co., (Buerkle) alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29, U.S.C. §§ 621-634, violations of the Employee Retirement Income Security Program (ERISA), 29 U.S.C. §§ 1001-1461, breach of an implied convenant of good faith and fair dealing, and misrepresentation. He seeks injunctive relief as well as compensatory and punitive damages, interest and attorney's fees. Jurisdiction is alleged under 28 U.S.C.

§§1331, 1337, 29 U.S.C. §216(b), and 28 U.S.C. §§ 2201, 2202. The matter is now before the court upon defendant's motion for summary judgment on all counts, or alternatively, for partial summary judgment.

Background

The facts relevant to this motion are essentially undisputed and are as follows. Plaintiff began to work for defendant on July 1, 1971 as a service manager. He claims that he was induced by Buerkle to leave his previous employment with General Motors. Plaintiff then worked for Buerkle for 13 years. At the age of 53, he was notified of his termination by David Calderwood, Buerkle's general manager. Defendant states that the decision to terminate plaintiff was based upon the recommendations of an independent consulting firm in connection with a reorganization of the entire service department. Plaintiff believes that the decision was based on his age.

Plaintiff was notified of his termination on Friday, December 30, 1983. He was given a letter of termination and a letter of resignation that offered six months' severance pay in exchange for a release. Plaintiff states that he knew that he was terminated, but he asked to take the documents home to think the matter over. He was told that "the decision had already been made" and that there "was no reason" for him to take the letters. Lancaster depo. at 120. The owner of the dealership, William Buerkle, joined the meeting between plaintiff and Calderwood. Plaintiff then told Buerkle and Calderwood that 6 months' severance pay was inadequate. Plaintiff states that Buerkle became quite angry at that point. Plaintiff then left the room to receive a service call and Calderwood told him subsequently that he would receive a year's severance pay.

On January 4, 1984, Calderwood met with the plaintiff at his home, bringing a check and a revised separation

agreement and release. In the interim, plaintiff did not contact a lawyer and asserts that he did not do so because he believed it would not have helped. Plaintiff states that because of the New Year's holiday he did not have an opportunity to consult with an attorney even if he had been given the documents.

At plaintiff's request, the following changes were added to the agreement before he signed it:

1. Defendant agreed to increase severance pay from six months to one year, totalling $38,972.50.
2. Defendant agreed to change the base rate for one year's severance pay from 1983 to 1984, a higher amount.
3. Defendant agreed not to contest any claim for unemployment compensation, even though plaintiff was receiving one year's salary as severance pay.
4. Defendant agreed to pay plaintiff's medical insurance premiums for six months.

Calderwood aff. The brief 1½ page separation agreement and release signed by the plaintiff provides in part:

> You hereby release the company, its officers and employees from each and every claim of any kind which you may have, or hereinafter may have resulting from your termination of employment by the company . . .

After signing the agreement, plaintiff was given and cashed a check for $29,229.37, the first installment of his severance pay. Plaintiff contends that after he filed his claim with the Minnesota Department of Human Rights, defendant withheld the unpaid portion of the severance pay in possible retaliation.

Discussion

Minnesota generally favors releases as an effecient means of settling disputes and presumes them to be valid. *Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F.

Supp. 1099, 1102 (D. Minn. 1981), *aff'd mem.*, 685 F.2d 438 (8th Cir. 1982); *Jeffries v. Gillitzer,* 302 Minn. 402, 225 N.W.2d 17, 20 (1975). A release is only valid, however, if a party has intentionally executed it and received consideration for the party's claim. *Couillard v. Charles T. Miller Hospital, Inc.,* 253 Minn. 418, 92 N.W.2d 96 (1958).

Factors to be considered in determining whether to dismiss a case based on release, include: 1) whether consideration was received; 2) the language of the release itself and whether the plaintiff was permitted to change language in the release; 3) whether plaintiff has an opportunity to consult an attorney before and at the time of settlement; 4) evidence of inequitable conduct, fraud, or misrepresentation in obtaining the release; 5) the existence of economic coersion in obtaining the release; and 6) evidence that the release is against public policy. *See, e.g. Schmitt-Norton Ford, Inc. v. Ford Motor Co.,* 524 F. Supp 1099, 1102-1103 (D. Minn. 1981), *aff'd mem.* 685 F.2d 438 (8th Cir. 1982).

Even viewing the facts in a light most favorable to Lancaster and giving him the benefits of all reasonable inferences, as necessary upon a motion for summary judgment, the court finds defendant is entitled to prevail on the basis of the release. It is undisputed that plaintiff received a first installment of over $29,000 in severance pay, as well as payment of medical insurance for six months. Sufficient consideration exists, when the releasor receives something of value to which the person had no previous right. *Burns v. Northern Pac. Ry. Co.,* 134 F.2d 766 (8th Cir. 1943). No material issue of fact is raised concerning consideration.

The record also indicates that the language of the release is plain and unambiguous. The entire agreement is contained on less than 1½ typewritten pages. The crucial

language is not obscured in fine print nor mired in legal jargon. Moreover, the release clearly encompasses the present suit. Plaintiff argues that statutory rights under the ADEA may never be waived, but offers as authority only a vacated decision. His argument is unpersuasive. Additionally, the record shows that Lancaster had input into the document and that substantial changes were made as a result.

Plaintiff stresses that he had no opportunity to consult an attorney and that he did not know what his rights were. Although the termination did take place around the New Year's holiday, plaintiff could have consulted a lawyer between the time he was notified of termination on Friday, December 30, 1983 and the time he signed the agreement on Wednesday, January 4, 1984. He chose not to. Absence of counsel may be a significant factor in ascertaining intent when the circumstances show an unusual need for legal advice. In this instance, however, the absence of counsel is less telling because the release language is simple. *See Sorensen v. Coast to Coast Stores, Inc.*, 353 N.W.2d 666, 669-670 (Minn. App. 1984). Moreover, the record shows that plaintiff has experience in business and in management, and has signed many contracts in his lifetime.

Plaintiff contends that although he read the agreement and signed it, he did not fully understand his rights. Causes of action existing at the time of the release, whether the party knows of them or not, are within the scope of a release. *Sorensen v. Coast to Coast Stores, Inc.*, 353 N.W.2d 666, 669 (Minn. App. 1984). Similarly, unknown and unexpected consequences from a known injury do not provide a sufficient basis for avoiding a release. *Schmidt v. Smith,* 299 Minn, 103, 216 N.W.2d 669, 672 (Minn. 1974). As the court noted in *Schmitt-Norton:*

> Unilateral mistake concerning the effect of a release is not a basis for setting it aside unless there is evidence that the other party obtained the release by fraud, misrepresentation, or other inequitable conduct.
>
> •••
>
> The plaintiffs do not claim they were misled about the nature of what they were signing but merely that they did not fully understand its implications, which is at most a claim of unilateral mistake, not of fraud, misrepresentation, or inequitable conduct.

524 F. Supp. at 1104. The court in *Sorensen* similarly stated:

> While mutual mistake of fact is a ground for nullifying a release, unilateral mistake is not unless the defendant wrongfully concealed facts from the plaintiff or induced the mistake in some other way.

353 N.W.2d at 670.

In the instant case, all of the facts upon which plaintiff relies for his causes of action occurred before the date of the release and were known to him. At the time he signed the release, he knew he had been terminated and he thought it unjustified. Plaintiff states that he did not understand the implications of the release, but his unilateral mistake of fact is not sufficient to avoid the release absent a showing of fraud, misrepresentation, or other inequitable conduct. He has made no such showing. In fact, plaintiff appears to concede in his memorandum that defendant's conduct did not amount to fraud or misrepresentation. *See* p. 12, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. Further, he has not alleged any facts showing such wrongful behavior. Nor do the alleged facts rise to inequitable conduct on defendant's part. Plaintiff did have a chance to meet with [illegible] superiors, to object to certain terms and to consider the release for five days. It is unfor-

tunate that a long-standing employee was suddenly terminated during the holiday season, but these facts alone do not justify overturning a validly-executed release.

Additionally, there is no genuine issue of material fact as to whether the release is void because of economic coercion. To challenge a release on the basis of economic coercion or duress the plaintiff must establish three elements: (1) that he involuntarily accepted the terms of the release, (2) that circumstances permitted only that alternative, and (3) that the defendant created the compelling circumstances through coercive acts. *Schmitt-Norton,* 524 F. Supp. at 1104, *aff'd mem.,* 685 F.2d 438 (8th Cir. 1982). *See also Oskey Gasoline and Oil Co., Inc. v. Continental Oil Co.,* 534 F.2d at 1286 (8th Cir. 1976); *Sorensen,* 353 N.W.2d at 670. Whether the facts are sufficient to constitute duress or coercion is a matter for the court to determine. *Oskey,* 534 F.2d at 1286; *Schmitt-Norton,* 524 F. Supp. at 1104.

In the instant case, plaintiff has not alleged any coercive acts, nor has he shown that no other alternative was available. He could have, for example, rejected the settlement offer and filed an action in court. Plaintiff admits that he was not threatened physically. Nor is it sufficient to allege that duress resulted from plaintiff's economic necessities. *See Oskey Gasoline and Oil Co. v. Continental Oil Co.,* 534 F.2d 1281, 1286 (8th Cir. 1976). The record suggests, moreover, that plaintiff was not financially destitute. *See* Lancaster depo. at 120-21, 123-25.

Finally, the court finds, as a matter of law, that the instant release is not against public policy.

In sum, the record shows that the parties voluntarily agreed to execute the release and that it is valid. While plaintiff is unhappy with the situation and the bargain, the undisputed record demonstrates as a matter of law that he considered the terms of the agreement and went along with

it. The court notes that he is entitled to receive the final installment of his severance pay and that counsel for defendant, at the hearing on this matter, promised to remit that sum to plaintiff promptly should the motion be granted.

Because of this resolution it is unnecessary to address other issues raised by the parties.

ORDER

Accordingly, based on the above and all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the motion of defendant for summary judgment is granted, and plaintiff's complaint is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 27, 1985

/s/ Diana E. Murphy
Diana E. Murphy
United States District Judge

86 1703

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 1987

KENNETH LANCASTER,

Petitioner,

vs.

BUERKLE BUICK-HONDA CO.

Respondent.

On Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Can rights under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., be waived by a private, unsupervised release, knowingly and voluntarily executed, where there is a bona fide factual dispute over liability?

PARTIES TO THE PROCEEDING

Petitioner:

Kenneth Lancaster

Respondent:

Buerkle Buick-Honda Co.

RULE 28.1 LISTING

Buerkle Buick Company d/b/a
Buerkle Buick-Honda Co. (parent)

Buerkle Motor Co. d/b/a
Buerkle Acura (subsidiary)

Buerkle Buick Leasing Co.
(Subsidiary)

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No._____

IN THE

Supreme Court of the United States

October Term, 1987

KENNETH LANCASTER,

Petitioner,

vs.

BUERKLE BUICK-HONDA CO.

Respondent.

On Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

PROCEEDINGS BELOW

On September 20, 1985, defendant Buerkle Buick-Honda Co. filed a motion for summary judgment on the grounds that the release signed by plaintiff was valid and enforceable, or in the alternative that plaintiff's claims were insufficient as a matter of law. On November 27, 1985, Judge Diana Murphy granted defendant's motion for summary judgment on the grounds that the release signed by plaintiff was a bar to this action. *Lancaster v. Buerkle Buick-Honda Co.*, 39 F.E.P. Cases 721, 6 E.B.C. 2635 (D. Minn. 1985). On January 21, 1987, the United States Court of Appeals for the Eighth Circuit affirmed the lower court. *Lancaster v. Buerkle Buick-Honda Co.*, 809 F.2d 539 (8th Cir. 1987).

STATEMENT OF THE CASE

This is an age discrimination case. Respondent, Buerkle Buick-Honda Co. ("Buerkle"), is a car dealership. Mr. Lancaster was hired as Buerkle's service manager at the age of 41 on July 1, 1971. He remained in that position throughout his employment. Based on the recommendations of an independent consulting firm in 1983, the entire service department was reorganized and Mr. Lancaster's employment was terminated. Mr. Lancaster was 53 years old.

Mr. Lancaster was notified of his termination by David Calderwood, the Company's General Manager, on Friday, December 30, 1983. During that meeting Mr. Lancaster was presented with a letter of termination and a letter of resignation that offered six months' severance pay in exchange for a release.

Mr. Lancaster knew the decision to terminate him was irrevocable. He knew he was not entitled to any severance pay or medical insurance premiums under any contract or company policy, and he knew he would not get any severance pay unless he signed the release. Mr. Lancaster told Mr. Buerkle, the President and Owner, and Mr. Calderwood, that six months' severance pay was grossly inadequate. He told them that if he got one year's severance pay they would never hear from him again.

Mr. Lancaster left the meeting for a short time to take care of a customer. When he returned, Mr. Calderwood told him that they would give him twelve months' severance pay. Mr. Lancaster said that twelve months' severance pay was acceptable.

On or about Wednesday, January 4, 1984, Mr. Calderwood called Mr. Lancaster to set up a meeting at

plaintiff's home at which the separation agreement could be finalized. Mr. Calderwood met with Mr. Lancaster at his home on January 4, 1984, five days after Mr. Lancaster's termination. During these five days Mr. Lancaster did not contact a lawyer because he believed it would not have helped.

During this meeting Mr. Lancaster was presented with a revised Separation Agreement and Release that had been redrafted to reflect the increase in severance pay from six months to one year. Mr. Lancaster obtained the following changes to the agreement:

1. Buerkle agreed to increase severance pay from six months to one year, totaling $38,972.50.
2. Buerkle agreed to change the base rate for one year's severance pay from 1983 to 1984, a higher amount.
3. Buerkle agreed to let Mr. Lancaster work for a competitor if he so chose.
4. Buerkle agreed not to contest any claim for unemployment compensation, even though Mr. Lancaster was receiving one year's salary as severance pay.
5. Buerkle agreed to pay plaintiff's medical insurance premiums for six months.

The Separation Agreement and Release signed by Mr. Lancaster provides in part:

> You hereby release the company, its officers and employees from each and every claim of any kind which you may have, or hereinafter may have resulting from your termination of employment by the company. . . .

After signing the release Mr. Lancaster was given a check for $29,229.37, representing the first installment of his severance pay. Buerkle did not lie to Mr. Lancaster to get him to sign the release. He was not forced to sign the agreement. He was not threatened with physical force and physical force was not used to get him to sign the release. He signed the release because he wanted the money.

Notwithstanding the clear and unambiguous language of the January 4, 1984 release, Mr. Lancaster filed this action on October 12, 1984, claiming the release was invalid.

REASONS FOR DENYING THE WRIT

I. *There Is No Conflict Among The Circuits.*

In *Runyan v. National Cash Register Corporation,* 787 F.2d 1039 (6th Cir. 1986) the Sixth Circuit, sitting en banc, carefully analyzed all of the relevant legislative history and case law and determined that ADEA claims may be waived without supervision where there is a dispute as to liability under the Act. In *Runyan,* the court further held that to determine whether the plaintiff knowingly and voluntarily waived his ADEA claims, ordinary contract principles apply. Subsequently, in *Moore v. McGraw-Edison Company,* 804 F. 2d 1026 (8th Cir. 1986) the Eighth Circuit adopted the reasoning in *Runyan* and held that where there is a fact dispute over intent and motivation, an ADEA claim may be waived without supervision. The court further held that a settlement of a fact dispute in that fashion does not compromise the policies of the ADEA, in the absence of fraud, deceit, or unconscionable overeaching, and is in accordance with encouraging amicable arm's length settlements of private disputes. In

this case, a different panel for the Eighth Circuit reaffirmed *Moore* and *Runyan.*

There are no other Circuit Court opinions on this issue. There is no conflict among the circuits and no compelling reason for this Court to consider the issue.

Moreover, recent proposed rules promulgated by the EEOC specifically exempt ADEA settlements from EEOC supervision. The EEOC examined the case law, the legislative history and purpose of the ADEA and found the remedial purpose of the statute would be better served by allowing the unsupervised settlement of disputes between employers and employees. The EEOC rejected as inappropriate the FLSA non-waiver standard and adopted the Title VII "voluntary and knowing" standard. 50 Fed. Reg. 40870-71 (1985).

II. *This Case Does Not Involve an Important Question of Federal Law.*

It is conceded that the issue of whether claims under the ADEA may be waived through an unsupervised release where there is a factual dispute over liability has not been decided by this Court. However, this issue does not involve fundamental constitutional rights; rather, it involves principles of contract law and statutory interpretation.

Recently, this Court denied certiorari in the *Runyan* case. 107 S. Ct. 178. The issues in *Runyan* are identical to the issues in this case. Consequently, this Court has previously determined that this issue is not of sufficient import to warrant review.

III. *The Court of Appeals Correctly Interpreted the Decisions of this Court in Determining that*

ADEA Rights May be Waived by a Private Unsupervised Release.

Plaintiff claims that all settlement agreements and releases relating to potential claims under the ADEA are invalid except those supervised by the EEOC or the courts. Plaintiff has not cited any cases interpreting the ADEA to support his contention. Rather, plaintiff relies on cases interpreting the FLSA to support his analysis. A close examination of these cases shows plaintiff's reliance is misplaced.

The first case plaintiff relies on is *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697 (1944). The issue presented in *O'Neil* was:

> [W]hether in the absence of a bona fide dispute between the parties as to liability, respondent's written waiver of his right to liquidated damages under § 16(b) [of the FLSA] bars a subsequent action to recover liquidated damages. We are of the opinion that it does not bar such claim.

324 U.S. at 704. In *O'Neil* there was no dispute with respect to liability under the FLSA. *Id.* at 700-04. The only issue before the Court was whether an employee could take less than the statutory amount pursuant to a settlement agreement and release. This Court held that an employee cannot waive his right to amount owing under the FLSA with respect to an undisputed claim. This Court reasoned that to allow such a compromise would be contrary to the Congressional policy to ensure employees are paid the statutory minimum wage. *Id.* at 707, 712-13.

The *O'Neil* Court specifically left open the issue of whether a settlement agreement and release could waive rights under the FLSA where there is a bona fide dispute

between the parties. This Court noted:

> Our decision . . . has not necessitated a determination of what limitation, if any, § 16(b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as a result if a bona fide dispute between the two parties, inconsideration of a bona fide compromise and settlement. Neither of the above mentioned cases presented such issues for our consideration.

324 U.S. at 714. The *O'Neil* decision was expressly limited to situations in which there was no dispute as to liability under the FLSA.

The next case cited by plaintiff is *D.A. Schulte, Inc. v. Gangi,* 328 U.S. 108 (1945). In *Gangi* this Court identified the issue as follows:

> The primary issue presented by the petition for certiorari is whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute over the *coverage* of the Act on a claim for overtime compensation and liquidated damages where the employees receive the overtime compensation in full.

Id. at 110 (emphasis added). In *Gangi* there was a bona fide dispute over whether the employer was covered by the FLSA. If the FLSA applied to the employer, there was no dispute that the employees were entitled to the money. *Id.* at 111-12. The *Gangi* Court stated:

> [W]e think the remedy of liquidated damages cannot be bargained away by bona fide settlements of disputes over *coverage. Nor do we need to consider here the possibility of compromises in other situations which may arise,* such as a dispute over

> the number of hours worked or the regular rate of employment. [Citing *Strand v. Garden Valley Telephone Company,* 51 F.Supp. 898 (D. Minn. 1943)] . . . .
>
> We think the purpose of the Act, which we repeat from the *O'Neil* case was to secure for the lowest paid segment of the nation's workers a subsistence wage, reach the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over *coverage.*

Id. at 114-116 (emphasis added). The *Gangi* decision was limited to situations in which there was a bona fide dispute with respect to applicability or coverage of the FLSA to a particular employer.

In *Strand v. Garden Valley Telephone Company,* 51 F.Supp. 898 (D. Minn. 1923), the case referenced by the *Gangi* Court, Judge Vogel considered the issue of whether an employer could obtain a valid and enforceable release where there is a legal issue regarding the number of hours subject to the FLSA. The *Strand* court noted:

> The dispute is a legal one, not one of fact. There is no honest dispute between the plaintiff and the defendant as to the hours on duty, but merely as to the legal effect of a part of those hours.
>
> . . . .
>
> Had the plaintiff Strand and the representatives of the defendant gotten together, discussed their dispute as to such hours, and if they had agreed, the facts not being clear, that she had expended so many hours in her work, and it had been agreed that that was the fact, and there was no definite method of ascertaining that such agreement did

> not represent the truth, then I think this defendant might have been able to settle or compromise such honest dispute, and that such compromise or settlement would have been binding.

Id. at 904-05. Therefore, under *Strand,* a bona fide factual dispute as to liability under the FLSA may be compromised and settled.

The case law at the time of the passage of the ADEA in 1967, as demonstrated above, had not directly addressed the validity of releases under the FLSA where there was a bona fide dispute between employer and employee with regard to *liability* under the FLSA. If, as according to petitioner, FLSA decisions were incorporated by reference into the ADEA at the time of its passage, then this issue regarding disputes as to liability was similarly left open under the ADEA. Even the cases subsequent to the passage of the ADEA cited by petitioner have not addressed this issue.

In *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981) this Court held that submission of a wage issue under the FLSA to an arbitration panel pursuant to a collective bargaining agreement did not bar a subsequent proceeding in District Court for unpaid minimum wages. This Court questioned the ability of labor arbitrators to decide legal issues and interpret statutes since a substantial portion of labor arbitrators were not lawyers and expressed concern over the limitations inherent in the labor arbitration forum. 450 U.S. at 730, 743-44.

In *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 85 L.Ed.2d 278 (1985) this Court again was confronted with the issue of whether claims under the FLSA could be settled and compromised where

there was a bona fide dispute over the *coverage* of the FLSA with regard to commercial activities of a religious foundation. Again, if there was coverage, there was no question that the amounts claimed were due. Again, if there was coverage, there was no question that the amounts claimed were due. *See* 471 U.S. at _____, 85 L.Ed.2d at 282-84.

In summary, under *O'Neil, Gangi,* and *Alamo Foundation,* claims under the FLSA cannot be compromised and settled if liability is undisputed or if the only dispute is whether the employer is covered by the FLSA. *Barrentine* merely stands for the proposition that a labor arbitration hearing is not an appropriate forum for FLSA claims. None of the cases cited by petitioner directly address the issue of whether claims under the FLSA can be compromised and settled where there is a bona fide dispute as to liability. To the contrary, *Strand* suggests such a settlement would be valid and binding. Petitioner is not only asking this Court to apply FLSA decisional law wholesale to the ADEA, but it is asking this Court to extend that law beyond its limits *and* apply it to the ADEA.

It is important not to lose sight that this case involves the ADEA, *not* the FLSA. Although the enforcement mechanisms may be the same or similar, the purposes underlying these statutes are vastly different. The Court in *Gangi* stated that the purpose of the FLSA was to secure for the lowest paid segment of the nation's workers a subsistence wage. 328 U.S. at 119. The reason the Supreme

Court read a non-waiver provision into the FLSA was to ensure the low-wage worker did not receive less than the minimum wage and overtime payments mandated by statute. In contrast, the purpose of the ADEA is to prevent age discrimination.

Because the purposes of these two statutes are different, it is inappropriate to transplant decisions interpreting the FLSA on a statute that does not share its purposes and policies. Furthermore, Mr. Lancaster does not fit within the class the Supreme Court was trying to protect when it read an antiwaiver provision into the FLSA. Mr. Lancaster was a highly paid employee who received a substantial amount of money in exchange for a full and complete release. A compromise of a claim such as Mr. Lancaster's does not offend the public policy of the FLSA. Moreover, the settlement of ADEA claims is in accordance with the goal of the ADEA, which is to obtain the voluntary and expeditious resolution of disputes by encouraging employers and employees to "find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621 (b).

It is also important to remember that the ADEA does not contain an anti-waiver provision. Consequently, absent a clear Congressional directive or purpose, such an anti-waiver provision should not be lightly inferred.

IV. A *Valid Release Under the ADEA Does Not Have To Mention the ADEA by Name.*

Mr. Lancaster suggests the release in this case is not valid because the ADEA is not specifically mentioned in the language of the release. An examination of the cases cited by Mr. Lancaster does not support this conclusion.

This Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) held that "an employee may waive his cause of action under Title VII as a part of a voluntary settlement." *Id.* at 52. This Court further noted that such agreements are valid as long as the settlement was "voluntary and knowing." *Id.* at 52 n.15.

The next case cited by Mr. Lancaster is *Lyght v. Ford Motor Co.*, 643 F.2d 435 (6th Cir. 1981). In *Lyght*, the court noted "Lyght's Title VII suit cannot be characterized as the action on one who is sued merely because he became dissatisfied with the payment with which he settled." *Id.* at 439. The *Lyght* court further noted that an employee may waive his cause of action under Title VII as a part of a voluntary settlement as long as that settlement was voluntary and knowing. *Id.* 439, 441.

Nothing in either of these cases requires a release of a Title VII claim to specifically mention Title VII by name. Plaintiff cites no cases under the ADEA supporting his position. To the contrary, both the Sixth Circuit in *Runyan*, 787 F.2d 1039, and the Eighth Circuit in *Moore*, 804 F.2d 1026, and in this case, *Lancaster v. Buerkle Buick*, 809 F.2d 539, 540-41 (8th Cir. 1987) have expressly held the ADEA need not be specifically mentioned for a release to be valid and binding. *See also Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983) (release that did not specifically mention Title VII claims that was given in exchange for a payment of $1,500.00 barred any further actions under Title VII); *Samman v. Wharton Econometric Forecasting Associates, Inc.*, 577 F.Supp. 934, 934-35 (D.D.C. 1984) (general release that did not specifically mention Title VII claims was valid).

The separation agreement and release signed by Mr. Lancaster in this case provides in part:

> You hereby release the company, its officers and employees from each and every claim of any kind which you have, or hereinafter may have resulting from your termination of employment by the company . . . .

Despite Mr. Lancaster's characterization of this release as "a very general, broad release" the release in clear and unambiguous language is narrowly drawn to cover only claims arising out of plaintiff's termination from employment. Under Mr. Lancaster's proposed interpretation, employers would be required to prepare a laundry list of all the Federal statutory and common law causes of action under which an employee could conceivably bring an action. This is not the law.

Based on applicable case law, it is not necessary for a release to specifically mention the ADEA to be valid and binding. The release in this case is even more narrowly drawn than the one in *Samman* and the consideration given was substantially greater. The release unambiguously releases all of Mr. Lancaster's claims relating to his employment.

V. *The Waiver Was Free and Voluntary Whether Title VII Standards or Ordinary Contract Principles Are Used.*

Mr. Lancaster argues that requiring supervised waivers of ADEA claims is necessary because older workers have diminished bargaining power, may be unaware of their rights, may be financially insecure, and may have bleak prospects for re-employment. However, with respect to the above, older workers are no different than members of other protected classes. Because the Supreme Court has

expressly approved unsupervised waivers for Title VII plaintiffs, there is no reason to prohibit unsupervised waivers for ADEA plaintiffs.

The release signed by Mr. Lancaster was voluntary and knowing. In exchange for the release, Buerkle agreed to pay Mr. Lancaster nearly $39,000, provided six months of paid medical insurance, and provided other benefits. The release is written in clear and unambiguous language. Before Mr. Lancaster signed the release, he read it, negotiated more favorable terms for himself, including a doubling of the severance pay originally offered, and had five days to think about it. The agreement contains no ultimatums or deadlines for its acceptance. Mr. Lancaster was a well-paid management employee who had experience in business and had signed a number of contracts in his lifetime. He could have refused to sign the release and filed suit. He chose to sign the release. No one forced him to sign it. He accepted the money.

VI. *Even If the Waiver Were Defective, Plaintiff's Substantive Claims Are Legally Deficient.*

As noted in Buerkle's brief before the District Court and the Court of Appeals, Mr. Lancaster's substantive claims are without merit. Therefore, even if the waiver was invalidated, Buerkle was entitled to summary judgment on the merits.

CONCLUSION

There is no conflict among the circuits regarding waivers under the ADEA. In contrast, the Eighth Circuit, the Sixth Circuit, and the EEOC all agree that unsuper-

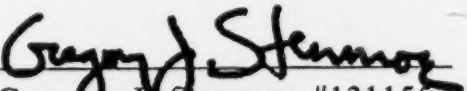
vised waivers of ADEA claims are permissible under the applicable law of this Court and statutory intent. Although this Court has not decided the issue, the issue is not one of special importance involving fundamental constitutional rights. This Court previously determined that this issue was not of sufficient import to warrant review when it denied certiorari in *Runyan v. National Cash Register Corp.* Moreover, the Court of Appeals correctly interpreted the decisions of this Court in deciding that ADEA rights may be waived by a private unsupervised release. Finally, the waiver was free and voluntary regardless of the standard that is applied. Plaintiff is merely seeking another hearing on issues that have been resolved twice against him.

For the reasons stated herein, respondent respectfully requests the petition for certiorari be denied.

Dated this 20th day of May, 1987

Respectfully submitted,

BRIGGS AND MORGAN

By 
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No. 86-1703 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH LANCASTER,

Petitioner,

– against –

BUERKLE BUICK HONDA COMPANY,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether § 7(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(b) prescribes the exclusive manner by which a waiver may bar a subsequent suit under that statute?

PARTIES TO THE PROCEEDING

Petitioner:
Kenneth Lancaster

Respondent:
Buerkle Buick Honda Company

Amicus Curiae:
American Association of Retired Persons

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No. 86-1703

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH LANCASTER,

Petitioner,

– against –

BUERKLE BUICK HONDA COMPANY,

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ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITIONER

The American Association of Retired Persons, "AARP", supports the petitioner's request for the issuance of a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this proceeding.

I. INTRODUCTION

A. *STATEMENT OF INTEREST OF AMICUS CURIAE*

The American Association of Retired Persons, "AARP", of 1909 K Street, N.W. Washington, D.C. 20049, is a not-for-profit membership corporation of more than 25 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force.

In keeping with its purposes, AARP has worked to alleviate age discrimination in employment as well as other aspects of life. During the past several years, the number of age discrimination charges[1] and lawsuits[2] has greatly multiplied. In response, many employers rely upon release agreements to obtain waivers of rights and claims from their older employees in an effort to avoid litigation.[3] Since the precise legal standard by which ADEA claims may be compromised is of paramount importance to AARP's members,[4] AARP submits this brief *amicus curiae* in support of the petition for a writ of *certiorari*.

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[1] From 1982 to 1985, age discrimination charges filed with the Equal Employment Opportunity Commission, ("EEOC") increased by 52 per cent. *See* Aging Services News at 109 (July 17, 1986).

[2] *See* Schuster & Miller, "An Empirical Assessment of the Age Discrimination in Employment Act," 38 Indus. & Labor Rel. Rev. 64 (1984).

[3] "How Using Releases Helps Avoid Age Discrimination Litigation," Nat'l L.J., June 17, 1985 at 17.

[4] In addition to its *amicus* participation in the court below, AARP submitted written comments to the Equal Employment Opportunity Commission, ("EEOC") on the subject of waivers under the ADEA. *See* 50 Fed. Reg. 40, 870 (1985).

B. *PRELIMINARY STATEMENT*

The issue in this case which merits review by this Court concerns the proper standard for determining the legality of a waiver of rights under the Age Discrimination in Employment Act of 1967, "ADEA", 29 U.S.C. § 621 *et seq*. The ADEA, by incorporating § 16(c) of the Fair Labor Standards Act of 1938, "FLSA"[5] explicitly provides the manner in which ADEA rights may be waived. *See* 29 U.S.C. §§ 216(c), 626(b). Under § 16(c) of the FLSA, an agreement supervised by the authorized agency constitutes a valid waiver.[6] By its express terms, the ADEA sets forth a standard for determining the validity of a waiver of ADEA rights.

Before the Eighth Circuit below, Petitioner raised the applicability of § 16(c), the general FLSA prohibition against waivers, and the voluntary and knowing standard. In reviewing Petitioner's arguments, the Eighth Circuit did not cite to,

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[5] FLSA § 16(c), 29 U.S.C. § 216(c) provides in pertinent part:

> The Secretary is authorized to supervise the payment of the unpaid minimum wages or the overtime compensation owing to an employee or employees under § 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any rights he may have under Subsection B of this Section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

This provision was specifically intended to create an incentive for employers to voluntarily enter into release agreements, *see* S. Rep. No. 640, 81st Cong. 1st Sess., reprinted in [1949] U.S. Code Cong. Serv. 2241, 2249, and to facilitate expeditious resolution of wage disputes without litigation. *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977).

[6] Pursuant to Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), the Equal Employment Opportunity Commission assumed responsibility for administration and enforcement of the ADEA from the Secretary of Labor. The Reorganization Plan has been ratified by Congress. Pub L. No. 98-532, 98 Stat. 2705 (1984).

and in any event did not follow, § 16(c) of the FLSA.[7] While the decision below mentions the standard applied by this Court that generally prohibits waivers of rights under the FLSA, it tersely dismissed the FLSA standard. *See Barrentine v. Arkansas - Best Freight System, Inc.*, 450 U.S. 728, 745 (1981); *D.A. Schnulte, Inc. v. Gangi*, 328 U.S. 108, 114 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945). The Eighth Circuit ultimately relied on the voluntary and knowing standard applied to Title VII cases, although it seemed to create another standard altogether, based solely on ordinary contract principles. Unless it is set aside, the decision below will cause uncertainty and confusion as to the proper standard and procedure applicable to ADEA waivers. Consequently, Supreme Court review is necessary to clarify this important issue.

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[7] The decision of the Eighth Circuit below is reported at 809 F.2d 539 and relies on *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986). *Moore* does not contain any mention or analysis of § 16(c) of the FLSA and disposes of FLSA caselaw in one sentence.

REASONS FOR GRANTING THE WRIT

I. THE STANDARD FOR DETERMINING THE VALIDITY OF ADEA WAIVERS IS A CRITICAL QUESTION OF LAW WHICH THIS COURT SHOULD RESOLVE

In enacting the Age Discrimination in Employment Act of 1967, ("ADEA"), 29 U.S.C. § 621 *et seq.*, Congress incorporated the procedural and remedial provisions of the Fair Labor Standards Act of 1938, ("FLSA"), 29 U.S.C. § 201 *et seq.*, and adopted the substantive prohibitions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. Lorillard v. Pons*, 434 U.S. 575, 585 (1978). The ADEA is a hybrid statute which proscribes arbitrary age discrimination in employment through a procedural scheme that scrupulously protects the rights of older workers. The question of whether the FLSA, Title VII, or some other standard determines ADEA rights has often resulted in inconsistent interpretations of the ADEA.[8] This case underscores the need for the Court to set forth definitive guidance concerning the manner in which ADEA claims and rights may lawfully be compromised.

"The question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank v. O'Neil*, *supra*, 324 U.S. at 705. Section 7(b) of the ADEA[9] incorporates

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[8] *See, e.g., Lorillard v. Pons*, *supra*, 434 U.S. at 577, n.3 (1978) (jury trials).

[9] ADEA, § 7(b) provides in part:

> The provisions of this Act shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217). . . .

29 U.S.C. § 626(b).

§ 16(c) of the FLSA which sets forth a specific procedure for waivers of statutory claims and rights. Section 16(c) provides that a waiver is valid and enforceable when supervised by the enforcing agency. 29 U.S.C. § 216(c). The proper inquiry for analyzing a waiver of FLSA rights is whether the waiver is in accordance with § 16(c), *Sneed v. Sneed's Shipbuilding, Inc., supra*, 545 F.2d at 539, which constitutes the only means by which FLSA rights may be compromised outside of litigation and a court settlement. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982).

Another standard for determining the validity of waivers has derived from this Court's holdings that a waiver of rights under the FLSA is generally prohibited.[10] *D.A. Schulte, Inc. v. Gangi, supra; Brooklyn Savings Bank v. O'Neil, supra; See also Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985); *Barrentine v. Arkansas - Best Freight System, Inc., supra*, 450 U.S. at 745. In *Runyan v. National Cash Register Corp.*, 759 F.2d 1253 (6th Cir. 1985), *vacated and rev'd* 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 107 S. Ct. 178 (1986), the Sixth Circuit carved out an exception to this Court's no waiver rule as applied to ADEA release agreements.[11] In that

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[10] The Court has recognized § 16(c) as an exception to the general prohibition against waivers. *Barrentine v. Arkansas-Best Freight System, Inc., supra*, 450 U.S. at 740, n.17 (1981).

[11] In *Runyan*, a panel of the Sixth Circuit first held that the ADEA prohibited a waiver or release of an individual's rights absent supervision or approval by the Equal Employment Opportunity Commission ("EEOC"). 759 F.2d 1253. The decision analyzed the statutory language of the ADEA and relied on Supreme Court caselaw which firmly established that the ADEA incorporated the enforcement provisions of the Fair Labor Standards Act of 1938, ("FLSA"). The court reasoned that since the FLSA unquestionably prohibited unsupervised waivers and releases, the ADEA must similarly prohibit unsupervised waivers. *Id.* On rehearing by the full Sixth Circuit, the court reversed itself. The Court based its holding on the peculiar facts in the case, emphasizing that the plaintiff was a labor law attorney who had negotiated the substance of the release agreement. *Runyan's* facts are unique and are distinguishable from those at bar.

case, the court concluded that the holdings in *O'Neil* and *Gangi*[12] did not resolve the issue of waivers involving bona fide factual disputes. 787 F.2d at 1044. Thus, while the court's analysis derives from the FLSA and its caselaw, the decision permits waivers under particular circumstances.

In addition to these FLSA standards for waivers, the courts have also established stringent standards for waivers of civil rights, such as those under Title VII. In Title VII cases,[13] a waiver is permitted where the employer can prove the waiver was voluntary and knowing.[14] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15 (1974). Certain district courts have relied on Title VII precedent and undertaken exacting inquiries into the parties' intentions in analyzing whether the waiver of ADEA rights was enforceable. *Valenti v. International Mill Service, Inc.*, *supra*, 610 F. Supp. at 37-38; *Valenti v. International Mill Service, Inc.*, 634 F. Supp. 57, 69-60 (E.D. Pa. 1985), *appeal docketed*, Nos. 86-1600, 1601 (3d Cir. Sept. 25, 1986); *EEOC v. United States Steel Corp.*, 583 F. Supp. 1357 (W.D. Pa. 1984).

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[12] In *O'Neil*, the employee had released all of his rights under the FLSA in exchange for overtime compensation due him. The employee later sued for liquidated damages under the FLSA. The Court held that the release agreement did not bar a suit for liquidated damages. 324 U.S. at 706-08. In *Gangi*, the Court extended this no waiver rule to apply in disputes over the FLSA's coverage. 328 U.S. at 114-116.

[13] Two approaches with varying degrees of scrutiny have evolved under the voluntary and knowing standard – a plain meaning rule versus a totality of the circumstances analysis. *See* Note, "Waiver of Rights Under the Age Discrimination in Employment Act of 1967," 86 Colum. L. Rev. 1067, 1072-1073 (1986).

[14] The Equal Employment Opportunity Commission has proposed a regulatory exemption to the ADEA which would allow the voluntary and knowing standard to be applied in ADEA waiver cases. *See* 50 Fed. Reg. 40, 870 (1985). This appears to represent a change in Commission policy as the Commission had previously argued that an unsupervised waiver was invalid, in accordance with the FLSA § 16(c) standard. *See Valenti v. International Mill Service, Inc.* 610 F. Supp. 36, 37 (E.D. Pa. 1985).

The Eighth Circuit's decision rejects the FLSA standards[15] and does not appear to faithfully adopt the Title VII standard. On its face, the decision does not recognize the existence of § 16(c) of the FLSA as part of the ADEA statutory scheme. In addition, the court expressly rejects this Court's holdings in *Gangi* and *O'Neil* as dispositive of ADEA waiver cases. And, while mentioning the Title VII standard, the court's minimal analysis strays from the stringent requirements of the voluntary and knowing standard applied in other ADEA cases. *See Valenti v. International Mill Service, supra; EEOC v. United States Steel Corp., supra.* Instead, the Eighth Circuit, appears to create another standard consisting of the application of ordinary contract principles to determine the validity of ADEA waivers.

The absence of a consistent standard for determining the validity of ADEA waivers is not an abstract or theoretical problem. It will necessarily have substantial practical consequences for employees and employers alike. Many older workers, like Petitioner in this case, are unaware of their rights,[16] financially insecure,[17] and more likely than younger workers to face bleak

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[15] The decision essentially ignores the holdings of *Lorillard v. Pons*, 434 U.S. 575 (1978), and *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985), which held that the specific enforcement procedures in § 16 of the FLSA are expressly incorporated into the ADEA. In refusing to follow or distinguish *Gangi* or *O'Neil*, the Eighth Circuit further undermines the import of *Lorillard* and *Thurston* which recognize that the ADEA's incorporation includes FLSA case law on questions of judicial interpretation of the ADEA's procedural provisions.

[16] A 1981 Louis Harris survey conducted by the National Council on Aging indicated that more than 50% of all workers in the protected class (40-70) were unaware of the protections afforded by the ADEA. Such statistics, standing alone, indicate that more than half of all protected class members, such as Petitioner, could not execute a knowing and voluntary waiver without additional information and advice.

[17] Many older workers, particularly in Petitioner's age group, 50-55, are without the security of a vested retirement income. A 1985 Government Accounting Office Report, HRD-85-81 (July 15, 1985), found that only 2.2% of males age 53 were entitled to pension benefits.

prospects for reemployment.[18] The discrimination most commonly experienced by older workers is termination, forced retirement or layoff,[19] in the context of which release agreements are frequently used,[20] as in the case here.

Moreover, employers are receiving instruction in how to obtain waivers[21] as a direct result of the decision in this case[22] and are increasingly using waivers as a preferred practice in their dealings with older workers.[23] The Eighth Circuit's decision here will exacerbate the uncertainty and confusion which older workers and their employers face when entering into termination and release agreements. In light of the use of the decision below as a model in other ADEA compromise settings, the need for guidance by this Court concerning the appropriate standard for determining the validity of waivers under the ADEA is an especially timely and compelling reason for granting *certiorari* in this case.

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[18] According to a Bureau of Labor Statistics study on displaced older workers, reemployment of displaced workers declines significantly with age. The study found that only 41% of those between the ages of 55-60 were able to reenter the labor force in any capacity, compared to 70% for those between the ages of 20-24. *Displaced Workers 1979-83*, U.S. Department of Labor, Bureau of Labor Statistics, July 1985, Bulletin 2240.

[19] Sixty-eight percent of the age discrimination charges filed with the EEOC in 1985 consisted of termination on layoff claims. *See Aging Services News*, 109 (July 17, 1986). *See also*, Schuster & Miller, *supra* note 2, at 71 (discharge and involuntary retirement comprise 67% of age discrimination litigation surveyed).

[20] *See e.g., Runyan, supra; Valenti v. International Mill Services, supra; EEOC v. United States Steel Corp., supra; Anderson v. Montgomery Ward & Co.*, 650 F. Supp. 1480 (N.D. Ill. 1987).

[21] "How Using Release Helps Avoid Age Discrimination Litigation", Nat'l L.J., June 17, 1985, at 17, 28-29.

[22] *See Fair Employment Practices Summary* (BNA); "Age Claim Releases: Pointers and Pitfalls," at 24 (Feb. 19, 1987).

[23] *See Fair Employment Practices Summary* (BNA) "Living with the Age Act Amendments," (Jan. 22, 1987).

CONCLUSION

For the foregoing reasons, *amicus curiae* AARP urges that the petition for a writ of *certiorari* be granted.

Dated: New York, New York
May 20, 1987

Respectfully submitted,

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